11-12-2013

State v. Tracy Appellant's Brief Dckt. 40783

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MICHAEL ROBERT TRACY, Defendant-Appellant.	NO. 40783 ADA COUNTY NO. CR 2012-2901 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Michael Tracy appeals, asserting that the district court erred in denying his motion to suppress the evidence found in his home pursuant to a warrantless search. The district court found exigent circumstances existed even though there was no imminent threat to any of the people in the house, as officers were informed by multiple witnesses that Mr. Tracy had left the scene, and none of the people present were exhibiting injuries which required immediate medical intervention. As such, there was time for the officers to have sought a warrant, and thus, the exigent circumstances exception is inapplicable. Therefore, since the warrantless search was not justified under one of the narrow, well-delineated warrant exceptions, the warrantless search violated Mr. Tracy's constitutional rights and the evidence found as a result should have been suppressed.

Statement of the Facts and Course of Proceedings

Officer Billie Cox and her partner, Officer Kirk Rush, responded to a 911 call reporting a domestic disturbance at approximately ten in the morning. (Tr., Vol.1, p.26, Ls.12, 22-23.)[1] The caller, one of the Tracys' neighbors, reported that there was a

[1] The transcripts in this case are provided in two independently-bound and independently-paginated volumes. To avoid confusion, the volume containing the transcript from the hearing on the motion to suppress held October 31, 2012, will be referred to as "Vol.1." "Vol.2" will refer to the volume containing the transcripts from the change of plea hearing held on December 5, 2012, and the sentencing hearing held on February 6, 2013. The State also requested that the district court review the transcript of the preliminary hearing held in these cases and consider the testimony given at that time, which the district court did. (Tr., Vol.1, p.39, Ls.8-14; R., p.88.) A motion to augment, or alternatively, take judicial notice of the transcript of that hearing was filed contemporaneously with this brief. "Vol.3" will refer to the volume containing the transcript of the preliminary hearing.

verbal argument, crying, and other loud noises, one of which sounded like a woman being thrown around inside the Tracy house. (Tr., Vol.1, p.13, Ls.1-6.) The neighbor indicated that she was concerned about Desirae Tracy (Mr. Tracy's wife) and her two children. (Tr., Vol.1, p.13, Ls.10-12.) As the officers were responding, Officer Cox spoke with the neighbor herself, and the neighbor informed Officer Cox that she had observed Mr. Tracy leaving the residence. (Tr., Vol.1, p.13, Ls.17-18, p.27, Ls.15-17; Tr., Vol.3, p.41, Ls.14-17.) Officer Cox estimated that the neighbor informed her that Mr. Tracy had left the house two to three minutes before she arrived on scene. (Tr., Vol.3, p.41, Ls.14-17.) Officer Cox also admitted that she was aware of no facts indicating that Mr. Tracy had returned to the residence. (Tr., Vol.1, p.23, Ls.13-15.) Nevertheless, Officer Cox testified that she believed it was "highly likely" that Mr. Tracy was in the apartment based on her hunch that he could have potentially reentered the apartment through the back door without anyone noticing. (Tr., Vol.1, p.15, L.25 - p.16, L.12; Tr., Vol.1, p.30, Ls.2-4.)

Officer Cox testified that when she and Officer Rush approached the Tracy residence, she did not hear any crying or other unusual sounds coming from inside the apartment. (Tr., Vol.1, p.34, Ls.14-21; Tr., Vol.3, p.20, L.15 - p.21, L.1.) Ms. Tracy answered the officer's knock at the door without any significant delay. (Tr., Vol. 1, p.14, Ls.2-3; Tr., Vol.3, p.63, Ls.11-19.) Officer Cox could see one of the two children from the doorway. (Tr., Vol.1, p.35, Ls.1-4.) Officer Cox also did not see anything of concern regarding the child she could see from the doorway. (Tr., Vol.1, p.35, Ls.5-7; Tr., Vol.3, p.24, Ls.19-24.) Officer Cox also did not observe any injuries on Ms. Tracy. (Tr., Vol.1, p.15, Ls.19-22; Tr., Vol.3, p.24, L.25 - p.25, L.2.) In fact, Officer Cox described

Ms. Tracy's appearance as "casual" and not otherwise disconcerting. (Tr., Vol.1, p.32, L.21 - p.33, L.4.)

Ms. Tracy confirmed that Mr. Tracy had left the apartment and that everything was fine with her and her children. (Tr., Vol.1, p.14, Ls.6-8; Tr., Vol.3, p.5, Ls.2-8.) Nevertheless, Officer Cox asked if she could enter the apartment to ensure that everyone was alright. (Tr., Vol.1, p.19, Ls.9-12.) Ms. Tracy refused to allow the officers into her home, but did offer to bring the other child, M.T., downstairs for the officers to see. (Tr., Vol.1, p.35, Ls.8-13.) At the point that Ms. Tracy brought M.T. downstairs, all the persons for whom the neighbor had been worried were in Officer Cox's field of vision. (Tr., Vol.1, p.28, Ls.18-21.)

Both officers testified that they saw linear red marks on M.T. (Tr., Vol.1, p.17, Ls.21-25; Tr., Vol.3, p.6, Ls.8-11; Tr., Vol.3, p.51, L.22 - p.52, L.1.) Ms. Tracy explained that those marks were caused by the way M.T. had been lying in his crib and that they would soon fade. (Tr., Vol.1, p.18, Ls.12-14.) Officer Cox admitted that the marks did fade while they were on scene. (Tr., Vol.1, p.25, Ls.22-24.) In fact, the pictures taken of M.T. that day do not clearly show any such marks. (R., pp.69-71 (photographs); R., p.88 (district court's finding as to the unremarkable nature of those photographs).) Nevertheless, the officers decided to enter the apartment over Ms. Tracy's objections. (Tr., Vol.1, p.19, Ls.9-12.) Officer Rush immediately proceeded upstairs, where he found a "marijuana grow" in one of the bedrooms. (Tr., Vol.3, p.54, Ls.6-11.)

As a result, the State charged Mr. Tracy with manufacturing a controlled substance, possession of a controlled substance, and possession of drug paraphernalia. (R., pp.35-36.) Mr. Tracy filed a motion to suppress the evidence found in the bedroom because the officers did not have a justification for the warrantless

search. (R., pp.53-54, 63-67.) The State contended that there were exigent circumstances justifying the warrantless search of the entire apartment. (R., pp.72-76.) The district court denied the motion, finding that exigent circumstances existed. (R., pp.87-90.)

Mr. Tracy subsequently entered a conditional guilty plea, preserving his right to appeal the district court's decision on the motion to suppress. (R., p.102.) Additionally, in exchange for Mr. Tracy's guilty plea to the possession charge, the State agreed to dismiss the remaining counts. (Tr., Vol.2, p.1, Ls.20-24.) The district court imposed a unified sentence of five years, with one year fixed, suspended for a five-year period of probation. (R., p.106.) Mr. Tracy filed a timely notice of appeal from that order. (R., p.114.)

ISSUE

Whether the district court erred when it denied Mr. Tracy's motion to suppress.

ARGUMENT

The District Court Erred When It Denied Mr. Tracy's Motion To Suppress

A. Mr. Tracy's Home Was Subject To The Protections Of The Fourth Amendment

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend IV. The Fourth Amendment is enforceable against the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *State v. Johnson*, 110 Idaho 516, 524 (1986). The Idaho Constitution provides its own, similar protections against unreasonable searches and seizures. IDAHO CONST. Art. I, § 17; *State v. Donato*, 135 Idaho 469, 471 (2001).

A unanimous United States Supreme Court has held that warrantless searches are *per se* unreasonable. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). Therefore, a warrantless search is presumed to violate the Fourth Amendment, unless the State demonstrates that one of the exceptional, well-established, and well-delineated exceptions to the warrant requirement is applicable. *Id.* at 390-91; *see also State v. Holton*, 132 Idaho 501, 503-04 (1999) (holding the same standard applies to Art. I, § 17 of the Idaho Constitution).

The United States Supreme Court and the Idaho Supreme Court have held that "[a] person's home 'is accorded the full range of Fourth Amendment protections.'" *Johnson*, 110 Idaho at 523 (quoting *Lewis v. United States*, 385 U.S. 206, 211 (1966)). Those protections can be violated in two ways. First, "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a 'search' within the original meaning of the Fourth Amendment has 'undoubtedly occurred.'"

Florida v. Jardines ___ U.S. ___, 133 S. Ct. 1409, 1414 (2013) (quoting *United States v. Jones*, 565 U.S. ___, 132 S. Ct. 945, 950-51 n.3 (2012)). That is because, "[a]t the Amendment's 'very core' stands 'the right of a man to retreat into his home and there be free from unreasonable government intrusion." *Jardines*, 133 S. Ct. at 1414 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). As such, a warrantless, physical trespass constitutes a violation of the Amendment's protections.

Second, when the State intrudes upon a space where the person has exhibited a subjective expectation of privacy, and that expectation is one that society would recognize as reasonable, the State has violated the Fourth Amendment's protections. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *State v. Wilkins*, 125 Idaho 215, 222 (1993). A person has a reasonable expectation of privacy within his own home, which is, in fact, "accord[ed] special protection." *Baldwin v. United States*, 450 U.S. 1045, 1046 (1981); *see Johnson*, 110 Idaho at 523 (recognizing the legitimate expectation of privacy in a person's home). Therefore, the warrantless intrusion into a person's home, where he had a reasonable expectation of privacy, constitutes a violation of the Fourth Amendment's protections.

Since the State cannot prove an exception to the warrant requirement existed in this case, the State violated Mr. Tracy's Fourth Amendment rights in both of these ways. As such, the evidence found as a result of that illegal search should be suppressed. *State v. Koivu*, 152 Idaho 511, 518-19 (2012).

B. There Were No Exigent Circumstances Justifying the Warrantless Search Of Mr. Tracy's House

One of the well-defined, narrow exceptions to the warrant requirement arises when there are exigent circumstances. "The exigent circumstances exception justifies a

warrantless search when the facts known to the police at the time of entry, along with reasonable inferences drawn thereupon, demonstrate a 'compelling need for official action and no time to secure a warrant.'" *State v. Barrett*, 138 Ida 290, 293-94 (Ct. App. 2003) (quoting *State v. Pearson-Anderson*, 136 Idaho 847, 849 (Ct. App. 2001)); *see also Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (same). Furthermore, "'the police bear a heavy burden when attempting to demonstrate an *urgent* need that might justify warrantless searches or arrests.'" *Robinson*, 144 Idaho at 499 (quoting *Welsh v. Wisconsin*, 466 US 740, 749-50 (1984)) (emphasis added).

Basically, as the United States Supreme Court has reiterated, "'warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement *so compelling* that the warrantless search is objectively reasonable under the Fourth Amendment.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (quoting *Mincey*, 437 U.S. 385, 393-94 (1978)) (emphasis added). Police officers do not have a duty, obligation, or right to enter a home simply because something seems amiss. *State v. Rusho*, 110 Idaho 556, 558-59 (Ct. App. 1986).

This does not mean that the police are prohibited from entering homes to protect the persons therein (a situation which may be particularly merited when officers are responding to a report of a domestic disturbance).

> No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; *so long as they have good reason to believe such a threat exists*, it would be silly to suggest that the police would commit a tort by entering, say, . . . to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected. (And since the police would then be lawfully in the premises, there is no question that they could seize any evidence in

> plain view or take further action supported by any consequent probable cause . . . .)[2]

Georgia v. Randolph, 547 U.S. 103, 118 (2006) (emphasis added) (citations omitted). However, the officers must have a good reason to believe that the threat still exists; the United States Supreme Court declined to adopt a bright-line rule that would allow officers to always enter a house when a domestic disturbance has been reported:

> We understand the possibility that a battered individual will be afraid to express fear candidly, but this does not seem to be a reason to think such a person would invite the police into the dwelling to search for evidence against another. Hence if a rule . . . were built on hoping to protect household victims, it would distort the Fourth Amendment with little, if any, constructive effect on domestic abuse investigations.

Id. at 119 n.7. Therefore, "[a] report of domestic violence does not *per se* amount to exigent circumstances." *State v. Wiedenheft*, 136 Idaho 14, 16 (Ct. App. 2001). In fact, the Idaho Court of Appeals has held that, when the situation is obviously defused, there is no exigency to justify a warrantless entry into the home:

> [T]he only factor that suggested a possible exigency was the report that [the defendant] Reynold's wife was being held against her will. By the time the officers arrived, however, Reynolds was standing outside the house, and the front door was ajar. **With the couple thus separated, it was apparent that if there was a woman in the house, she was under no immediate risk form Reynolds** while he was outside being questioned by an officer. Therefore, there was no exigency that would justify entry into the house without first knocking or calling out to bring any occupant to the door where she could be interviewed and the situation assessed. . . . [T]he surrounding circumstances did not suggest an *immediate* danger that would justify dispensing with [the limitations on the officers' ability to enter the home without a warrant].

State v. Reynolds, 146 Idaho 466, 471 (Ct. App. 2008) (emphasis in italics from original; emphasis in bold added). The Court of Appeals went on to specifically note that the

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[2] As the United States Supreme Court noted, this discussion was not relevant to the question presented to the Court. *Randolph*, 547 U.S. at 118. Therefore, it is dicta and not controlling. *State v. Hawkins*, 155 Idaho 69, 74 (2013).

potential victim could, while talking with officers at the door, dispel their concerns of any immediate risk, thereby negating any exigency potentially present. *Id.* As such, there is a critical fact scenario which must exist alongside the report of domestic violence that clearly delineates when the exigent circumstances exception is applicable. *See Mincey*, 437 U.S. at 390-91 (noting that the exceptions to the warrant requirement must be well-delineated).

Idaho precedent on point is clear as to what the facts must show in regard to the exigent circumstances exception: "law enforcement officers may enter a home without a warrant to render emergency medical assistance to an injured occupant or to protect an occupant from *imminent* injury." *State v. Araiza*, 147 Idaho 371, 375 (Ct. App. 2009) (emphasis added); *State v. Ward*, ___ P.3d ___, 2013 Opinion No.55, p.3 (Ct. App. 2013) (same). This is because "[t]he only manner in which the government can justify such an entry is to show that the entry was based upon probable cause *and* that exigent circumstances existed necessitating **immediate** police action." *State v. Curl*, 125 Idaho 224, 225 (1993) (citing *Payton v. New York*, 445 U.S. 573 (1980)) (emphasis in italics from original, emphasis in bold added). As such, "[t]he exception applies where the facts known at the time of the entry indicate a 'compelling need for official action and *no time to secure a warrant.*'" *State v. Smith*, 144 Idaho 482, 485-86 (2007) (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)) (emphasis added).

This is consistent with the United States Supreme Court's holdings in such cases: finding that exigent circumstances existed where "the officers were confronted with *ongoing* violence occurring *within* the home." *Brigham City*, 547 U.S. at 405 (emphasis in original); *see also Randolph*, 547 U.S. at 118 (indicating that officers must "have good reason to believe such a threat exists" in order to enter the house without a

warrant in the domestic violence scenario). The officers in *Brigham City* actually witnessed, through the open kitchen door, the victim take a punch and start spitting blood into a sink, while other people moved to restrain the aggressor. *Brigham City*, 547 U.S. at 401. In that set of circumstances, "the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning." *Id.* at 406. The need for the officers to enter the house and intervene was very clearly imminent in that case.

The requirement that there be an *imminent* threat is necessary because this exception to the warrant requirement is based on a lack of time to secure a warrant. *See, e.g., Smith*, 144 Idaho at 485-86; *Araiza*, 147 Idaho at 374-75. "'When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some *real, immediate and serious consequences* if he postponed action to get a warrant.'" *State v. Yeates*, 112 Idaho 377, 381 (Ct. App. 1987) (quoting *McDonald v. United States*, 335 U.S. 451, 460 (1948) (Jackson, J., concurring)) (emphasis added). Basically, if there is time to seek a warrant because there is no imminent threat, then the facts, by their nature, do not constitute *exigent* circumstances. As such, "[t]he exigent circumstances exception does not apply where there is time to secure a warrant." *State v. Robinson*, 144 Idaho 496, 501 (Ct. App. 2007) (citing *Tyler*, 436 U.S. at 509; *State v. Worthington*, 138 Idaho 470, 472 (Ct. App. 2002)).

Thus, the question becomes whether any potential threat (such as Officer Cox contended may have existed in this case, based on no articulable facts, but only her hunch that Mr. Tracy might have come back in through the back door without being

seen by anyone[3] (*see* Tr., Vol.1, p.16, L.20 - p.17, L.1)), constitutes an *imminent* threat requiring an immediate, warrantless entry into the home over the resident's objection. The Idaho Court of Appeals has already discussed the nature of imminent threats in a nearly identical case. *Compare Rusho*, 110 Idaho at 559-60.

> In [*Rusho*], the district court found that the neighbor's telephone call, informing the police that Mrs. Rusho had fled from her home in fear of an intruder, created an exigency. That finding is uncontested in this appeal. The police responded to the telephone call with commendable promptness. The first officer to arrive was told by one of the neighbors that the Rusho house had already been checked and that no intruder had been found. However, the officer had not talked to Mrs. Rusho and, so far as he was aware, she still wanted the premises to be thoroughly examined by the police. When the second officer arrived, he spoke to Mrs. Rusho. For the sake of this discussion we will presume, as did the district court, that she told the officer 'there is nobody in there, just forget it.' By this time, Mrs. Rusho and her children were outside the house, *in no immediate danger.* The first officer, a neighbor and Mrs. Rusho herself had entered the house without incident. Nevertheless, the district court ruled that an exigency still existed and that it was sufficient to justify a warrantless search of the entire house despite Mrs. Rusho's presumed objection.
>
> We disagree. In our view, the finding that an exigency still existed was clearly erroneous. There was no compelling emergency.

Id. (emphasis added). The Court of Appeals explained its reasoning:

> [E]ven though the possibility of an intruder had not been wholly eliminated, we do not believe that such a bare possibility is sufficient to justify a warrantless, nonconsensual search. . . . Fourth [A]mendment values would be gravely impaired if the mere report of an intruder became a license for the police to enter a home and to search it without a warrant, over the homeowner's objection.

Id. at 560. Therefore, the Court of Appeals decided:

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[3] It should be noted that only thirteen minutes elapsed from the time Officer Cox was dispatched on the call to the time she arrived on the scene. (Tr., Vol.1, p.26, Ls.22-23.) In fact, the reporting witness told Officer Cox that Mr. Tracy had left the scene only two to three minutes before Officer Cox arrived on scene. (Tr., Vol.3, p.41, Ls.14-17.) As such, there was almost no time for Mr. Tracy to have doubled back in the manner Officer Cox described and not have been seen by anyone, particularly the neighbor who called 911 and with whom Officer Cox was talking while *en route*.

> We hold that such warrantless and nonconsensual searches are permissible only if there is probable cause to believe that an intruder exists and it reasonably appears that persons or property are in immediate danger. The report of an intruder, uncorroborated by other facts, is insufficient to overcome a homeowner's right to say 'forget it.' In this case, we conclude, upon the facts found or presumed by the district court, that probable cause was not established and that any degree of danger remaining when the second officer entered the house was insufficient to justify the subsequent search of the basement by both officers.

Id. As such, the officers did not have a legal right to enter the house, and thus, the evidence of marijuana manufacturing found on one of the other floors of the house had to be suppressed. *Id.* at 558-59, 561.

In this case, as in *Rusho*, the initial 911 call from the neighbor undoubtedly initially established an exigency, as the neighbor reported an ongoing conflict in the Tracy household. (Tr., Vol.1, p.13, Ls.1-6.) As in *Rusho*, the officers promptly responded to that call. (*See* Tr., Vol.1, p.26, Ls.22-23.) However, as in *Rusho*, events occurred during the time it took the officers to respond which changed the nature of the situation. *See also Reynolds*, 146 Idaho at 471 (noting that, by the time officers arrived on scene, the husband had stepped outside the house, and with the couple separated, there was no longer an immediate risk to the potential victim inside the house). Officer Cox testified that she spoke with the reporting neighbor while she was driving to the scene, and the neighbor told her that Mr. Tracy had left the residence. (Tr., Vol.1, p.26, L.24 - p.27, L.14.) Ms. Tracy confirmed this when she opened the door to the officers. (*See, e.g.*, Tr., Vol.1, p.15, Ls.4-8.) Officer Cox admitted that she had no facts suggesting that Mr. Tracy had since returned to the residence. (Tr., Vol.1, p.23, Ls.13-16.) And even if there was the possibility that Mr. Tracy had returned, "such a bare possibility is [not] sufficient to justify a warrantless, nonconsensual search." *Rusho*, 110 Idaho at 560. Therefore, with the couple separated and no apparent

imminent threat to Ms. Tracy, there was no exigency justifying the officers' warrantless entry and search of the apartment.

Furthermore, Officer Cox testified that she did not see any injuries on Ms. Tracy. (Tr., Vol.1, p.15, Ls.19-22), nor did she see any injuries on the other child. (Tr., Vol.3, p.24, Ls.19-24.) In fact, Officer Cox thought Ms. Tracy looked "casual," and nothing about her appearance caused the officer any concern. (Tr., Vol.1, p.32, L.21 - p.33, L.4.) Officer Cox also testified that she did not hear any unusual sounds (crying, screaming, rattling, and the like) coming from inside the apartment. (Tr., Vol.1, p.34, Ls.14-21.) In fact, Ms. Tracy assured Officer Cox that everything was fine.[4] (Tr., Vol.1,

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[4] Certainly, officers are not required to take a person potentially involved in a domestic dispute at their word when they tell officers that everything is fine. *See, e.g., Araiza*, 147 Idaho at 376; *see also Reynolds*, 146 Idaho at 471 (noting that, if such assurance were given, but the officers still had a reasonable concern that a person was in danger, "perhaps a warrantless entry would have been justified"). However, for such action to be reasonable, the officers must be able to point to some fact, other than the fact that a disturbance had been reported, to justify their suspicion of the person's statement. *See, e.g., Randolph*, 547 U.S. 103 at 119 n.7 (recognizing that a rule to the contrary would "distort the Fourth Amendment with little, if any, constructive effect on domestic abuse investigations"); *Wiedenheft*, 136 Idaho at 16 (tracing this rule, that there be actual facts contradicting the statement of assurance through various decisions from several jurisdictions); *Yeates*, 112 Idaho at 381 (holding that the officer must be able to identify "some *real, immediate and serious consequences* if he postponed action to get a warrant'") (emphasis added).

For example, in *Sailas*, the officers could hear an ongoing argument as they approached and saw that the victim was bloodied when she answered the door and tried to assure them that all was well. *State v. Sailas*, 129 Idaho 432, 434-35 (Ct. App. 1996). As such, since the officers "*interrupted* a domestic dispute that *has already grown violent*, the officer can reasonably suspect that such a statement by an *injured victim* is prompted by duress or fear of retaliation from the perpetrator *who is still present.*" *Id.* (emphasis added). As discussed *supra*, none of those facts are present in this case.

Similarly, in *Pearson-Anderson*, the officers were responding after a 911 call and a call-back had both been prematurely terminated, and they found the defendant and victim wrestling on the floor. *Pearson-Anderson*, 136 Idaho at 850. As such, the victim's assurance that everything was fine could be reasonably disregarded so that officers could learn whether there were any third parties in the house. *See id.* at 849. In *Araiza*, officers responded to a report that an unknown person was attempting to force entry into a house, and since they had been unable to confirm Mr. Araiza's

p.19, Ls.9-12.) Finally, Officer Cox testified that, once Ms. Tracy had brought M.T. down from his bedroom, all the persons besides the male suspect were accounted for and in Officer Cox's field of vision. (Tr., Vol.1, p.28, Ls.18-21.) As the Court of Appeals suggested in *Reynolds*, this would dispel any prior exigencies, since no one could be said to be in immediate danger. *Reynolds*, 146 Idaho at 471.

The only thing about this situation which caused Officer Cox any immediate concern were the red lines she claimed to see on M.T., although she could not tell if anything was actually wrong with him. (Tr., Vol.1, p.17, L.21 - p.18, L.9.) The district court subsequently found that the pictures Officer Cox took do not clearly show the alleged marks on M.T. (R., p.88; *see* R., pp.69-71 (the photographs Officer Cox took).) Ms. Tracy assured Officer Cox that any such marks were the result of the way M.T. had been sleeping and would soon go away. (Tr., Vol.1, p.18, Ls.10-14.) In fact, Officer Cox admitted that the marks faded while they were on scene, and that M.T. did not appear to be in any discomfort. (Tr., Vol.1, p.25, Ls.17-24.) They obviously did not merit immediate action, *compare Barrett*, 138 Idaho at 293-94, since M.T. was not in obvious distress (Tr., Vol.3, p.30, Ls.2-5 (Officer Cox testifying that M.T. was not crying, but was calm instead)) and since Officer Cox did not call for medical assistance. (Tr., Vol.3, p.36, ls.12-14.)

The critical point is this: there was no *imminent* threat, such as would require the officers to enter the apartment without first obtaining a warrant. All the household members who might be at risk were accounted for and not in immediate distress. *See*

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identity with family members at the scene, the victim's statement of assurance could reasonably be disregarded. *Araiza*, 147 Idaho at 376. In *Wiedenheft*, officers noticed a red mark on the victim's forehead which was swelling noticeably and was clearly a fresh injury, which, combined with the fact that the victim was visibly upset, allowed them to disregard her statement of assurance. *Wiedenheft*, 136 Idaho at 816-17.

Reynolds, 146 Idaho at 471 (indicating that, where the situation was obviously not active, had officers confirmed that the potential victim was not, in fact, in harm's way, there would not be a justification for entry under exigent circumstances). The *Reyonlds* Court contrasted that situation with that in *Barrett*, 138 Idaho at 293-94, where the defendant had exited his home in obvious medical distress and it was unknown whether the other members of his family were in similar distress inside the house. *See Reynolds*, 146 Idaho at 471. Ms. Tracy was not noticeably distressed. *Compare Wiedenheft*, 136 Idaho at 816-17. There were also no obvious injuries contradicting Ms. Tracy's assertions that everything was alright. *Compare Rusho*, 110 Idaho at 559-60. Simply put, there were no exigencies to justify the warrantless entry of the Tracys' home. Therefore, Mr. Tracy's motion to suppress the fruits of that search should have been granted.

CONCLUSION

Mr. Tracy respectfully requests that this Court reverse the district court's order denying his motion to suppress the evidence found during the officer's warrantless search of the apartment and remand this case for further proceedings.

DATED this 12th day of November, 2013.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of November, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

MICHAEL ROBERT TRACY
972 SAILVIEW LANE
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PATRICK H OWEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

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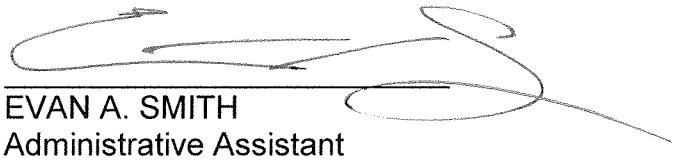
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

BRD/eas